



**Muthemba & another v Mungai & 2 others; Kentazuga Hardware Limited
(Interested Party) (Commercial Miscellaneous Application E247 of 2024)
[2025] KEHC 1598 (KLR) (Commercial and Tax) (14 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1598 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E247 OF 2024
MN MWANGI, J
FEBRUARY 14, 2025**

BETWEEN

JOHN MUNGAI MUTHEMBA 1ST PLAINTIFF

AMM HOLDINGS LTD 2ND PLAINTIFF

AND

JANE NJERI MUNGAI 1ST DEFENDANT

DAVID MUTHEMBA MUNGAI 2ND DEFENDANT

RAYMOND KIHU MUNGAI 3RD DEFENDANT

AND

KENTAZUGA HARDWARE LIMITED INTERESTED PARTY

RULING

1. This ruling is in respect to the 2nd defendant’s Notice of Preliminary Objection dated 16th April 2024. It was filed subsequent to the plaintiffs’ filing of the Notice of Motion erroneously dated 20th October 2024 instead of 20th March 2024 and filed on 22nd March, 2024. The said application has been brought under the provisions of Sections 1A, 1B & 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 142, 143, 145, 238, 239, 780 & 782 of the *Companies Act*, No. 17 of 2015 and all enabling provisions of the law.
2. In the said application, the 1st plaintiff seeks orders to be allowed to continue with the suit filed against the defendants as a derivative suit on behalf of the 2nd plaintiff. The 1st plaintiff also seeks an order for



- stay of proceedings in MCOMMSU No. E146 of 2024 and for adoption of the Dispute Settlement Agreement dated 8th March 2024, among other orders.
3. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. John Mungai Muthemba, the 1st plaintiff herein.
 4. In opposition to the said application, the 2nd defendant filed a Notice of Preliminary Objection dated 16th April 2024 raising the following grounds–
 - i. That Sections 238 and 239 of the *Companies Act* have not been met to warrant leave to proceed with a derivative suit;
 - ii. That the applicant herein approved the filing of the suit against the defendant in BPRT Case No.1040 of 2023, MCOMMSUE/E146 of 2024 as per his admission in his supporting affidavit paragraphs m, n, o, p, q and the doctrine of estoppel (sic) bars him from rescinding this position and is therefore part of the said agreements; and
 - iii. That the proceeding (sic) is an abuse of Court process.
 5. Directions were given that the Notice of Preliminary Objection would be canvassed first by way of written submissions. The 2nd defendant’s submissions were filed on 22nd April 2024 by the law firm of Muhatia Pala & Associates Advocates, whereas the 1st plaintiff’s submissions were filed by the law firm of M. A. Ngesa & Company Advocates on 9th May 2024. The 1st defendant’s submissions were filed by the law firm of Simba & Simba Advocates on 14th May 2024. The said submissions were highlighted on 30th July 2024.
 6. Mr. Muhatia Pala, learned Counsel for the 2nd defendant submitted that the 1st plaintiff has failed to allege and/or demonstrate among others, that the actions of the majority members amounted to fraud. He relied on the case of David Langat v St. Lukes Orthopedic & Trauma Hospital Ltd & 2 others [2013] eKLR, and argued that the 1st plaintiff’s application is for personal gain since the company’s interests have taken the back seat. For this reason, the 2nd defendant contended that the application by the 1st plaintiff does not meet the threshold for admission by this Court.
 7. Mr. Munywoki, learned Counsel for the 1st defendant cited the provisions of Sections 238(3) & 239 of the *Companies Act*, 2015 and the case of Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & another [2017] eKLR, and submitted that the 1st plaintiff has not made out a case to warrant being granted an order for leave to institute a derivative suit. Counsel referred to the provisions of Section 241(2) of the *Companies Act* and the case of Isaiah Waweru Ngumi & 2 others v Muturi Ndung’u [2016] eKLR, and contended that the application by the 1st plaintiff neither represents the interests of other shareholders nor the 2nd plaintiff herein, and that it is not anchored on good faith.
 8. Ms. Ngesa, learned Counsel for the 1st plaintiff relied on the case of Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696, and submitted that the 2nd defendant’s Preliminary Objection has not been properly raised, because the issues raised therein require interrogation of facts during trial in order for them to be aptly determined, as they are not pure points of law.

Analysis And Determination.

9. Upon perusal of the 2nd defendant’s Notice of Preliminary Objection dated 16th April 2024 and the written submissions filed by Counsel for the parties, the issue that arises for determination is whether the 2nd defendant’s Notice of Preliminary Objection should be sustained.



10. In order for a Preliminary Objection to succeed, it should raise a pure point of law, it should be argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
11. What constitutes a valid Preliminary Objection was considered by the Court of Appeal in the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (supra)* as follows –

So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.
12. In the said case, Sir Charles Newbold P., stated the following-

... the first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.
13. The validity of Notices of Preliminary Objection was also discussed by the Supreme Court in the case of *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 others* [2015] eKLR, where it was held as follows –

Thus, a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.
14. The 2nd defendant contends that the provisions of Sections 238 & 239 of the *Companies Act*, 2015 have not been met to warrant leave being granted to the 1st plaintiff to proceed with a derivative suit. The said defendant also contends that the 1st plaintiff approved the filing of the suit against the defendant in BPRT Case No.1040 of 2023, MCOMMSUE/E146 of 2024, and for that reason, he is barred by the doctrine of estoppel from rescinding that position. Issues of whether or not the 1st plaintiff has met the provisions of Sections 238 & 239 of the *Companies Act* to warrant leave being granted to institute a derivative suit, and whether or not the 1st plaintiff approved the filing of BPRT Case No.1040 of 2023 & MCOMMSUE/E146 of 2024 are factual issues. The said issues call for probing of evidence and ascertaining of facts by way of affidavits.
15. In view of the afore cited authorities, this Court finds and holds that what has been raised by the 1st defendant as a Preliminary Objection does not amount to one in the true sense of the law, as the grounds raised can only be argued in the normal manner, and determined after the Court has probed evidence adduced and ascertained facts.
16. In my considered view, this is one of the instances in which the defendants should have let the application filed by the 1st plaintiff proceed on for hearing on merits instead of raising a Preliminary Objection.



17. The upshot is that the 2nd defendant's Notice of Preliminary Objection dated April 16, 2024 is devoid of merits. It is hereby dismissed with costs to the 1st plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF FEBRUARY 2025.

Ruling delivered through Microsoft Teams online Platform.

NJOKI MWANGI

JUDGE

In the presence of:

Ms Ngesa for the plaintiffs

No appearance for the 1st defendant

Ms Maya h/b for Mr. Munywoki for the 2nd defendant

No appearance for the 3rd defendant

No appearance for the interested party

Ms B. Wokabi – Court Assistant.

NJOKI MWANGI, J.

